

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

TIM SCHMIDT, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
legally uninsured, administered by STATE COMPENSATION INSURANCE FUND,
*Defendants***

**Adjudication Number: ADJ10192708
Van Nuys District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of the August 29, 2024 Findings of Fact & Order (F&O) issued by the workers' compensation administrative law judge (WCJ). In that decision, the WCJ found that applicant sustained admitted industrial injury to his ears, lower back, right knee, and in the form of hearing loss while employed as a parole agent during the period from March 1, 1992 through March 28, 2012. The WCJ further found that applicant is entitled to temporary disability benefits from March 28, 2012 through June 1, 2015. Based on these finding, the WCJ ordered defendant to "administer temporary disability ... benefits according to the findings of fact above, in an amount to be adjusted by the parties, with jurisdiction reserved in the event of a dispute." The F&O does not specify the temporary disability indemnity rate being awarded. In the Opinion on Decision, the WCJ stated "it is found that Applicant is entitled to temporary disability indemnity for the period from March 28, 2012, through June 1, 2015, subject to Labor Code §4661.5, less credit for any time worked and indemnity paid, including EDD, subject to Labor Code §4656 and less reasonable attorney fees on any retroactive amount."

Defendant contends that the F&O fails to state a temporary disability indemnity rate, that the indemnity rate pursuant to Labor Code¹ section 4661.5 was not an issue at trial, and that there was no meeting of the minds as to the appropriate temporary disability indemnity rate payable pursuant to section 4661.5.

¹ All further statutory references are to the Labor Code, unless otherwise noted.

We did not receive an answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration recommending that we deny reconsideration.

Based upon our preliminary review of the record, we will grant defendant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to section 5950 et seq.

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on October 3, 2024, and 60 days from the date of transmission is December 2, 2024. This decision is issued by or on December 2, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 3, 2024, and the case was transmitted to the Appeals Board on October 3, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 3, 2024.

II.

Preliminarily, we note the following, which may be relevant to our review:

The WCJ's Report states:

Timothy Schmidt (Applicant) sustained an industrial injury from March 1, 1992, through March 28, 2012. On June 5, 2024, the case proceeded to trial on the following issues: "1. Whether the applicant is entitled to temporary disability benefits from March 28, 2012, through June 1, 2015. 2. Whether the apportionment outlined by QME Dr. Thomas Vangness constitutes substantial medical evidence." (Minutes of Hearing and Summary of Evidence, Exhibit A, p. 2, EAMS Doc. I.D. #78061654.) At the trial, the parties stipulated to Applicant's earnings at \$1,780.56 per week, which would warrant a maximum indemnity rate for temporary disability.

On August 28, 2024, the undersigned issued the Findings of Fact and Order (FF&O), which found the temporary disability benefits for March 28, 2012, to June 1, 2015, subject to Labor Code §4656 and §4661.5, inter alia. The FF&O did not list an indemnity rate for temporary disability, but indicated the weekly wages at the time of injury were \$1,780.56, which would warrant a maximum indemnity rate for temporary disability. This was based on the stipulation by the parties. Defendant now contends there was a misunderstanding and mistake of fact regarding the stipulation for the maximum rate for temporary disability being applicable per Labor Code §4661.5, thus the order in the FF&O that was based on the stipulation for maximum temporary disability rate should be set

aside and the temporary disability rate should be based on two-thirds of the weekly wages rather than the maximum rate. It is for this claimed unilateral mistake and stipulation of defendant that they now seek to be relived from and is the subject of the instant petition for reconsideration.

Defendant's Petition for Reconsideration is based on the following grounds:

1. By the order, decision or award made and filed by the WCJ, the Division of Workers' Compensation acted without or in excess of its powers.

The petitioner, essentially, argues that there was a misunderstanding and mistake of fact regarding a stipulation. Specifically, petitioner wishes to be relived of Stipulation #3 entered into on the record at the time of trial, "At the time of the injury, the employee's earnings were \$1,780.56 per week, warranting maximum rate of indemnity for temporary disability and permanent disability." (Minutes of Hearing and Summary of Evidence, p. 2, 11, 10-12, EAMS Doc. I.D. #78061654.) The petitioner fails to mention that this alleged mistake and misunderstanding is unilateral on the part of the defendant. The applicant has not stated that there was any mistake nor misunderstanding. No answer to the petition for reconsideration was filed by the applicant.

(Report, at pp. 2-3.)

The Pretrial Conference Statement prepared by the parties at the mandatory settlement conference (MSC) on March 20, 2024 reflects stipulation of employee earnings of "\$1,780.56" per week, warranting an indemnity rate of "per statute" for temporary disability and "Per code" for permanent disability.

III.

We highlight the following legal principles that may be relevant to our review of this matter:

Section 4661.5 states:

Notwithstanding any other provision of this division, when any temporary total disability indemnity payment is made two years or more from the date of injury, the amount of this payment shall be computed in accordance with the temporary disability indemnity average weekly earnings amount specified in Section 4453 in effect on the date each temporary total disability payment is made unless computing the payment on this basis produces a lower payment because of a reduction in the minimum average weekly earnings applicable under Section 4453.

(Lab. Code, § 4661.5.)

Moreover, contract principles apply to settlements of workers' compensation disputes. Stipulations between the parties must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. (*County of San Joaquin v. Workers' Compensation Appeals Bd. (Sepulveda)* (2004) 117 Cal.App.4th 1180, 1184 [69 Cal.Comp.Cases 193]; Civ. Code, § 1636.)

Here it is unclear from our preliminary review of the existing record as to whether there was a stipulation to the maximum temporary disability indemnity rate by the parties, particularly as it pertains to the payment of indemnity pursuant to section 4661.5. Taking into account the statutory time constraints for acting on the petitions, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

IV.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal.2d 360, 364.) "[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.]")

“The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect.” (*Azadigian v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen’s Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a “threshold” issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].)

Section 5901 states in relevant part that:

No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers’ compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. . . .

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

For the foregoing reasons,

IT IS ORDERED that defendant’s Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 2, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD

**TIM SCHMIDT
ROSE, KLEIN & MARIAS
STATE COMPENSATION INSURANCE FUND**

PAG/00

*I certify that I affixed the official seal of
the Workers' Compensation Appeals
Board to this original decision on this
date. o.o*